



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

April 8, 2003

Ms. Zandra L. Narvaez  
Legal Services Division  
City Public Service of San Antonio  
P.O. Box 1771  
San Antonio, Texas 78296-1771

OR2003-2369

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179079.

The City Public Service of the City of San Antonio ("CPS") received a request for a copy of a certain awarded bid. You state that the release of the submitted information may implicate the proprietary rights of ARAMARK Corporation ("ARAMARK"). Consequently, you notified this third party of the request for information under section 552.305 of the Government Code. Although you do not take a position with regard to the disclosure of the requested information, ARAMARK has submitted briefing to this office in which it contends that its information is excepted from disclosure under section 552.110 of the Government Code. We have considered ARAMARK's claimed exceptions and reviewed the submitted information.

We first address ARAMARK's assertion that the release of the requested information would have "a chilling effect on Texas public bidding processes" and that "Texas public bodies and, ultimately, their constituents and taxpayers, will be disadvantaged" by such public release. With respect to this argument, we understand ARAMARK to rely on the previous version of section 552.110, which excepted from disclosure "a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, sec. 552.110, 1993 Tex. Gen. Laws 583, 601. In construing this provision, this office looked to the case of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which established the standard for applying the correlative exception in the federal Freedom of Information Act ("FOIA"). Open Records Decision No. 639 at 3 (1996). Under the *National Parks* test, commercial or financial information is confidential under Exemption Four of FOIA "if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability

to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Nat’l Parks*, 498 F.2d at 770 (footnote omitted). ARAMARK apparently relies on the *National Parks* test in contending that its information is confidential under section 552.110(b) of the Government Code.

However, pursuant to a decision by the Third Court of Appeals and a change made to section 552.110 by the Texas Legislature in 1999, this office no longer applies the federal test in determining whether commercial or financial information is excepted from disclosure under section 552.110. *See* Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 7, 1999 Tex. Gen. Laws 4500, 4503; *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied to commercial and financial information and requires that the third party whose information is at issue make a specific factual or evidentiary showing that disclosure of its information would likely result in substantial competitive injury to itself. *See* Gov’t Code § 552.110(b); Open Records Decision No. 661 at 5-6 (1999). Because ARAMARK does not demonstrate how the release of its information would cause it substantial competitive harm, we find that CPS may not withhold ARAMARK’s information under section 552.110(b).

We turn now to ARAMARK’s remaining section 552.110 arguments. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

ARAMARK states that submitted customer lists, information relating to specialized processes, personnel information, lists of employees, certain methodologies and policies, management information, wage information, pricing information, and information relating to contract conditions are excepted from disclosure as trade secrets under section 552.110(a). Upon review of ARAMARK's arguments and its information, we conclude that ARAMARK has established that portions of the submitted information are excepted from disclosure as trade secrets. See Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). Further, we have not received any arguments that rebut ARAMARK's claims as a matter of law. Thus, based on ARAMARK's arguments, we find that CPS must withhold the information we have marked under section 552.110(a). We also find, however, that ARAMARK has failed to establish a *prima facie* case that its remaining information is excepted as trade secrets. See Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 184 (1978), 175 at 3 (1977) (although third party proposal otherwise excepted under predecessor to section 552.110(a), resumé information subject to release). Accordingly, the remaining information is not excepted from disclosure under section 552.110(a).

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

We note that portions of the submitted information not otherwise excepted under section 552.110 are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act].” Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, CPS must withhold the e-mail addresses in the remaining submitted information, a representative sample of which we have marked under section 552.137.<sup>2</sup>

In summary, CPS must withhold from disclosure the portions of ARAMARK’s information we have marked under section 552.110(a) of the Government Code. E-mail addresses in the submitted information, a representative sample of which we have marked, are excepted from disclosure under section 552.137. CPS must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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<sup>2</sup>We note that section 552.137 does not apply to a government employee’s work e-mail address, the general e-mail address of a business, nor to a web site or web page.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 179079

Enc: Submitted documents

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